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10 **UNITED STATES DISTRICT COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**

12 VENTURA FOODS, LLC, a
13 Delaware limited liability company,
14 Plaintiff,

15 v.

16 FOOD KING, S.A. de C.V., a
17 Mexican corporation,
18 Defendant.

Case No. 15-cv-2349-BAS(JMA)

**ORDER DENYING PLAINTIFF'S
EX PARTE APPLICATION FOR
EXTENSION OF TIME AND
ISSUANCE OF LETTER
ROGATORY WITHOUT
PREJUDICE**

[ECF No. 7]

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20
21 Presently before the Court is Plaintiff's *ex parte* application for: (1) an
22 extension of time to serve the complaint to Defendant; (2) issuance of a Letter
23 Rogatory in accordance with the Convention on the Service Abroad of Judicial and
24 Extrajudicial Documents in Civil or Commercial Matters ("Hague Service
25 Convention"); and (3) issuance of a Letter Rogatory in accordance with the Inter-
26 American Convention on Letters Rogatory. (ECF No. 7.)

27 For the following reasons, the Court **DENIES WITHOUT PREJUDICE**
28 Plaintiff's *ex parte* application in its entirety.

1 **I. EXTENSION OF TIME**

2 Plaintiff requests a 360-day extension of time to serve the complaint to
3 Defendant in Mexico. (Pl.'s *Ex Parte* Appl. 6:11–14.) Federal Rules of Civil
4 Procedure Rule 4(m) governs the time limit for service. It states the following:

5 If a defendant is not served within 90 days after the
6 complaint is filed, the court—on motion or on its own after
7 notice to the plaintiff—must dismiss the action without
8 prejudice against that defendant or order that service be
9 made within a specified time. But if the plaintiff shows
10 good cause for the failure, the court must extend the time
11 for service for an appropriate period. *This subdivision (m)*
does not apply to service in a foreign country under Rule
4(f), 4(h)(2), or 4(j)(1).

12 Fed. R. Civ. P. 4(m) (emphasis added).

13 Because Plaintiff is attempting to serve Defendant in Mexico under Rule
14 4(h)(2), it is exempted from the 90-day time limit for service. *See* Fed. R. Civ. P.
15 4(m). “Courts have reasoned that the foreign country exception is a ‘recogni[tion]
16 that the timeliness of foreign service is often out of the plaintiff’s control.’” *Allstate*
17 *Ins. Co. v. Funai Corp.*, 249 F.R.D. 157, 161 (M.D. Pa. 2008) (quoting *Nylok Corp.*
18 *v. Fastener World Inc.*, 396 F.3d 805, 807 (7th Cir. 2005)). However, some courts
19 have determined that the exemption from the 90-day time limit for service in a foreign
20 country “does not apply if a plaintiff makes no effort to serve the foreign defendant
21 abroad.” *Id.* at 162 (citing *USHA (India) Ltd. v. Honeywell Int’l Inc.*, 421 F.3d 129,
22 134 (2d Cir.2005)).

23 Plaintiff’s request for a 360-day extension of time is moot because Rule 4(m)
24 exempts Plaintiff from the 90-day time limit for service. However, the Rule 4(m)
25 exemption for time limit for service does not give Plaintiff an infinite time to serve
26 Defendant. *See Allstate*, 249 F.R.D. at 162 (finding that the exemption did not apply
27 because plaintiff had “not made a reasonable, good faith effort to attempt service
28 abroad during the [service] period”). Plaintiff must be able to demonstrate it made an
effort to serve the Defendant in a timely manner in order to take advantage of the

1 exemption provided by Rule 4(m). *See id.* At this time, the Court finds Plaintiff has
2 made efforts to serve Defendant in a timely manner.

3 However, the Court **DENIES AS MOOT** Plaintiff's request for an extension
4 of time beyond 90 days pursuant to Rule 4(m).

5 6 **II. LETTER ROGATORY FOR THE HAGUE SERVICE CONVENTION**

7 In addition to the extension of time, Plaintiff requests the Court to issue a letter
8 rogatory in accordance with the Hague Service Convention to aid in Plaintiff's
9 service of Defendant in Mexico. (Pl.'s *Ex Parte* Appl. 8:16–20.)

10 Both the United States and Mexico are signatories of the Convention on the
11 Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial
12 Matters, done at The Hague on November 15, 1965 ("Hague Service Convention").

13 The Hague Service Convention provides:

14 The authority or judicial officer competent under the law
15 of the State in which the documents originate shall forward
16 to the Central Authority of the State addressed a request
17 conforming to the model annexed to the present
Convention, without any requirement of legalisation or
other equivalent formality.

18 Art. 3, Hague Service Convention, 20 U.S.T. 361, 1969 WL 97765, at *1. The Hague
19 Service Convention does not require a letter rogatory be issued by a court under the
20 law of the State that is requesting service abroad. *See id.* Rather, the treaty allows any
21 attorney competent under the law of the requesting State to contact the Central
22 Authority of the requested State to aid in serving an individual or corporation abroad.
23 *See id.* The Hague Service Convention allows attorneys to serve judicial and
24 extrajudicial documents abroad without the assistance of the court, and as a result,
25 this Court finds it unnecessary, and possibly improper, to issue a letter rogatory for
26 the Plaintiff to serve under the Hague Service Convention.

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1 Accordingly, the Court **DENIES** Plaintiff's request to issue a letter rogatory
2 in accordance with the Hague Service Convention because the treaty does not require
3 a letter rogatory to serve the complaint in Mexico.

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5 **III. LETTER ROGATORY FOR INTER-AMERICAN CONVENTION**

6 Plaintiff also requests the Court to issue a letter rogatory in accordance with
7 the Inter-American Convention on Letters Rogatory. (Pl.'s *Ex Parte* Appl. 10:1-4.)
8 However, the Hague Service Convention is the superior means for service abroad.

9 The Hague Service Convention states that "[t]he present Convention shall
10 apply in all cases, in civil or commercial matters, where there is occasion to transmit
11 a judicial or extrajudicial document for service abroad." Art. 1, Hague Service
12 Convention, 20 U.S.T. 361, 1969 WL 97765, at *1. The United States Supreme Court
13 implied that this language determined that plaintiffs must apply the Hague Service
14 Convention when applicable by distinguishing the use of mandatory language in the
15 Hague Service Convention with the use of discretionary language in the Hague
16 Evidence-Taking Convention. *See Société Nationale Industrielle Aérospatiale v. U.S.*
17 *Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 568 n.15 (1987).

18 Following *Société Nationale*, the Hague Service Convention should apply to
19 Plaintiff's complaint considering the mandatory language used in the Hague Service
20 Convention. *See Société Nationale*, 482 U.S. at 568 n.15. The treaty clearly states
21 that all cases involving civil or commercial matters requiring service abroad shall
22 apply the Hague Service Convention. *See* Art. 1, Hague Service Convention, 20
23 U.S.T. 361, 1969 WL 97765, at *1. Therefore, following the text of the Hague
24 Service Convention, Plaintiff's primary means of service in Mexico is under the
25 Hague Service Convention and not the Inter-American Convention.

26 Accordingly, the Court **DENIES** Plaintiff's *ex parte* application to issue a
27 letter rogatory in accordance with the Inter-American Convention.


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1 **IV. CONCLUSION & ORDER**

2 In light of the foregoing, the Court **DENIES WITHOUT PREJUDICE**
3 Plaintiff's *ex parte* application in its entirety. (ECF No. 7.) However, the Court is not
4 unsympathetic to the demands being placed by Mexico before agreeing to serve a
5 summons. Accordingly, the Court simultaneously with this order issues an order
6 certifying with an original signature that the summons in this case is a valid one from
7 this Court.

8 **IT IS SO ORDERED.**

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10 **DATED: December 8, 2016**

11 
12 **Hon. Cynthia Bashant**
13 **United States District Judge**
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